Supreme Court, U.S.
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No. 02-279

IN THE

Supreme Court of the United States

SAKS FIFTH AVENUE and HARVE BENARD, LTD.,

Petitioners,

v.

CASHMERE & CAMEL HAIR MANUFACTURERS INSTITUTE and L.W. PACKARD & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the denial of summary judgment in a false advertising case where (i) the Court of Appeals has already determined, based on its review of the evidence, that "a reasonable factfinder could conclude that the defendants' material mislabeling of their garments deceived the consuming public, enabled defendants to lower their garment prices, and caused [plaintiff] Packard to lose sales," (ii) ample evidence supports that determination, and (iii) the case is now awaiting trial in the district court.

RULE 29.6 STATEMENT

The respondents are private corporations that have not issued shared of stock to the public, no parent or publicly held company owns 10% or more of either company's stock, and neither company has any affiliates or subsidiaries that have issued shares to the public.

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STATEMENT OF THE CASE

This Petition seeks interlocutory review of the denial of a summary judgment request by the defendants in a Lanham Act and Massachusetts state law false advertising case. The Court of Appeals held that summary judgment was inappropriate because, *inter alia*, "a reasonable factfinder could conclude that the defendants' material mislabeling of their garments deceived the consuming public, enabled defendants to lower their garment prices, and caused [plaintiff] Packard to lose sales." *See* Petition for Certiorari ("Petition") at p. 36a. The defendants now petition this Court to review that fact-specific determination *de novo*.

Inexplicably, the Petition fails to describe the evidence which the Court of Appeals held precluded summary judgment. Instead, the Petition mistakenly assumes that there was no such evidence, and constructs an entire argument based on that assumption. In the process, it repeatedly misstates the facts, the issues, and the applicable law in an attempt to suggest that the Court of Appeals' decision is somehow a departure from existing precedent, inconsistent with appellate decisions from other Circuits, and contrary to this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

These arguments are not persuasive, and the Petition should be denied. The evidence that the defendants materially mislabeled their garments for profit, in willful violation of both state and federal law, is compelling, and the Court of Appeals correctly stated and applied the pertinent rules of law in holding that summary judgment was inappropriate.

A. THE PARTIES, THE CLAIMS, AND THE PROCEEDINGS BELOW

The plaintiffs-respondents herein are L.W. Packard & Co., Inc. ("Packard"), a manufacturer of cashmere and cashmere-

wool blend fabric which sold its products to garment manufacturers, and the Cashmere and Camel Hair Manufacturers' Institute (the "Institute"), a trade association of domestic and foreign cashmere manufacturers formerly known as the Camel Hair and Cashmere Institute of America. *See Camel Hair and Cashmere Manufacturers Institute v. Associated Dry Goods Corporation, et al.*, 799 F.2d 6 (1st Cir. 1986). The defendant-petitioners are manufacturers and retailers of ready-to-wear garments.

In the action below, plaintiffs have alleged that throughout most of the 1990's, defendants Harve Benard, Ltd. ("Harve Benard"), Saks Fifth Avenue ("Saks"), and Filenes Basement ("Filenes")[1] trafficked in falsely described goods in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); sections 2 and 11 of the Massachusetts Unfair and Deceptive Trade Practices Statute, M.G.L. c. 93A; and common law principles of unfair competition. Specifically, plaintiffs claim that during the relevant time period, the defendants unlawfully passed off thousands of partially recycled wool garments (the "Harve Benard garments") as cashmere by falsely representing, in fine print hang tags, that they consisted of "10%" cashmere, and then falsely labeling them, on much more prominent sewn-in tags, as "*Cashmere and Wool*," "*A Luxurious Blend of Cashmere and Wool*," "*Cashmere Blend*," or "*Wool and Cashmere*."

Packard seeks damages and other monetary relief on account of the fact that during the relevant time period, its garment manufacturer customers significantly reduced their purchases of Packard's genuine cashmere blend fabric because they could not compete, in the low cashmere blend garment market, with

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1. Filenes is now in bankruptcy. *See In re FBC Distribution Corp. f/k/a Filenes Basement Corp.*, Case No. 99-16985 (D. Mass. Bkrptcy 1999).

the mislabeled Harve Benard garments — which, although prominently labeled as cashmere, in fact contained no cashmere and were partially recycled, and therefore cost substantially less to make. The Institute has not sought damages; only injunctive relief and its litigation expenses.

In their motion for summary judgment, the defendants conceded that the issue of whether the Harve Benard garments were mislabeled was "both material and genuinely in dispute." They argued, however, that there was no evidence that their alleged mislabeling had actually deceived any members of the consuming public, or caused Packard any harm, and that they were therefore entitled to summary judgment dismissing Packard's claims for monetary relief under the Lanham Act and related state laws. In August of 1998, the defendants' summary judgment motion was referred to a United States Magistrate for a report and recommendation (the "Report"). In July of 1999, that Report was issued, and recommended that the motion be allowed as to the bulk of the plaintiffs' claims.

The plaintiffs timely objected to the Report on grounds, *inter alia*, that it impermissibly drew all inferences in favor of the moving party defendants, instead of the plaintiffs, in violation of *Celotex*. Notwithstanding these objections, the district court adopted the Magistrate's Report in early 2000, granted the defendants' motion for summary judgment, and subsequently entered final judgment for the defendants.

The plaintiffs then appealed to the United States Court of Appeals for the First Circuit (without in any way "recognizing the sufficiency" of Harve Benard's testing program, as the Petition mistakenly claims). After a review of the entire record, the Court of Appeals reversed the lower court decision on grounds that, *inter alia*, "the district court relied on impermissible inferences in reaching its conclusions," and in granting summary judgment. *See* Petition for Certiorari at 2a.

B. THE EVIDENCE IN THE RECORD AT THE SUMMARY JUDGMENT STAGE

At the summary judgment stage, the following evidence was in the record, and was part of what was relied upon by the Court of Appeals in holding that summary judgment dismissing the plaintiffs' claims was not appropriate:

Harve Benard is a U.S.-based manufacturer/importer of ready-to-wear garments. In the 1990's, it sold large quantities of garments to major retail store chains such as Saks Fifth Avenue, Filenes Basement, and others. Beginning in the Fall of 1994, Harve Benard began manufacturing and selling a new line of womens' coats, labeled as consisting of a blend of cashmere and wool, that were made of fabric purchased from a textile mill in Prato, Italy called Marcolana Lanificio S.R.L., or "Marcolana." It continued to sell these Harve Benard garments throughout the period 1994-1999.

In 1995, the plaintiffs began purchasing random samples of the Harve Benard garments from retail locations in New York, Boston, and New Jersey. Like all the Harve Benard garments at the time, these were labeled with hang tags representing, in fine print, that they contained "10% Cashmere," and separate sewn-in labels claiming, in larger and more prominent typefaces, that they were "*A Luxurious Blend of Cashmere and Wool*," "*Cashmere and Wool*," or "*Wool and Cashmere.*" Each sample was assigned a control number (*e.g.* "CCMI No. 428B", A76), and each garment and/or its fabric was forwarded to one or both of two well-established experts in the field of cashmere identification and textile analysis. One expert, Prof. Kenneth D. Langley, employed high resolution light microscopy to conduct his analyses. The other expert, Dr. Franz-Josef Wortmann, Ph.D., used a powerful electron microscope.

Both experts had worked for decades, and had published extensively, in the specific fields of textile analysis and cashmere identification.

In each case, the experts found that the Harve Benard garments contained no cashmere. Dr. Wortmann also concluded that approximately 10 to 20% of the fibers in the Harve Benard garments were recycled — that is, reconstituted from the chopped up and chemically stripped remnants of previously used or woven garments. This conclusion was later supported by an admission in Harve Benard's documents that its Marcolana mill was using "recicled" material to make the portion of the fabric in these garments that Harve Benard claimed was cashmere.

After this litigation was filed, the presence of recycled material in the Harve Benard garments was confirmed in the report of one of Harve Benard's own experts. After that report was issued, and plaintiffs pressed the matter by filing a motion for temporary restraining order, Harve Benard agreed to change the fine print percentage content labels on the Harve Benard garments to add the word "Recycled." *See* Petition at 4a, note 3 ("After this suit was filed, Harve Benard agreed to label its 1996 and subsequent line of blazers as being made from recycled cashmere.")

The defendants continued to represent that the Harve Benard garments consisted of "10%" cashmere, however, and to market the garments with separate sewn-in labels claiming, in a larger typeface which made no reference to the "10%" figure or the word "recycled," that they were "*Cashmere Blend*," or "*Wool and Cashmere.*" The garments also continued to be prominently advertised in catalogues as "**cashmere blend** *jackets*," again with no reference to the word "recycled." In 1996, 1997, 1998, and 1999, the plaintiffs purchased additional samples of the Harve Benard garments and sent them to their experts for

analysis. Again, in each and every case, the garments were found to contain no cashmere, recycled or otherwise.

Dr. Wortmann, an expert in probability and statistics, testified that if ten randomly selected garments were mislabeled as cashmere when in fact they were not, there was a 90% probability that the vast majority of the entire group of garments was also mislabeled. In this regard, ten randomly selected Harve Benard garments were tested in 1995, and all were found to contain virtually no cashmere. Thereafter, nine additional Harve Benard garments were tested by plaintiffs' experts — in some cases by both experts — and in each case, they were found to contain no cashmere.

During the period that Harve Benard was marketing these garments, Packard's garment manufacturer customers sharply reduced their purchases of Packard's 10% cashmere fabric because, as they explained it, they could not compete, in the cashmere blend garment market, with the Harve Benard garments — which, although labeled and represented as "Cashmere," in fact were made from cheaper woolen fabric that contained no cashmere, and was partially recycled. The testimony on this from Packard's sales agent Peter Warshaw, identified by Packard's President as "the most knowledgeable person" regarding Packard's customers, was specific:

> Q: So what is the basis for the assertion that *Gilmore stopped buying Packard fabric as a result of Harve Benard's alleged mislabeling?*
>
> A: Because sometime after that I spoke to Ben Rabiner of Gilmore, and he told me that *it was no longer possible for him to buy our product* because of the fact that manufacturers like *Harve Benard* were producing garments that

were much more competitive than garments that he, Ben Rabiner, could manufacture from Packard fabric.

Q: *Did he mention Harve Benard specifically*?

A: *Yes*. . . .

* * *

Q: What's the basis for the assertion that *RCM stopped purchasing Packard fabric as a result of Harve Benard's alleged mislabeling*?

A: Same basis as I've described for Gilmore and for others . . .

Q: *Did anyone at RCM specifically mention Harve Benard*?

A: *Yes*. . . .

* * *

Q: Who at [LWP's customer] RCM mentioned Harve Benard?

A: Michael Kaufman. . . .

* * *

Q: *Did he tell you specifically* that they could not — *that they could no longer purchase Packard fabric as a result of Harve Benard's alleged price advantage*?

A: *Yes.*

(emphasis added).[2]

In addition, during the period that Harve Benard was marketing the Harve Benard garments, another of Packard's customers attempted to sell genuine "10% Cashmere" jackets — made from Packard's 10% cashmere fabric—to the retailer Saks Fifth Avenue, but was informed by Saks that the prices of the Harve Benard garments — also represented to be "10% Cashmere" — were so much lower that Saks would not consider buying the garments made from Packard's fabric.

Again, the evidence on this from Packard's sales agent was specific:

> Q: What's the basis for your assertion that [Packard's garment manufacturer customer] Perfect Petite stopped buying Packard fabric as a result of Harve Benard's alleged mislabeling?
>
> A: I believe I've already told you about Ted Goldsmith's experience with Saks Fifth Avenue. I'd be happy to repeat it. Ted Goldsmith and his company, Perfect Petite, has enjoyed a good relationship with Saks Fifth Avenue and other retailers. . . . He had had experience with our low cashmere content fabrics, had a high regard for L.W.Packard's integrity, felt that L.W. Packard's products were extremely competitive, and decided to

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2. The district court specifically held that Mr. Warshaw's account of these statements by Packard's customers, "in which these customers attributed their reluctance to purchase LWP fabric to HB's [Harve Benard's] price advantage," was admissible in evidence. Petition at 75a.

> try and penetrate the low cashmere content blazer market and decided to try it with Saks Fifth Avenue.
>
> So he sampled a 10 percent cashmere blazer fabric from us, tailored the garment, showed it to the Saks buyer and *was told by the Saks buyer that . . . it was too expensive relative to what she had been using from Harve Benard.* And in that instance *Harve Benard was specifically mentioned. . . .*
>
> * * *
>
> Q: And Perfect Petite stopped buying Packard fabric allegedly as a result of Harve Benard's alleged mislabeling and other manufacturers' alleged mislabeling?
>
> A: *Yes.*

(Emphasis added). The problem, as Packard's President John Glidden explained in his deposition, was that

> [b]ecause Harve Benard was not putting the cashmere in the fabric, they had a tremendously reduced cost. . . . the added expense of putting cashmere in a garment or in a fabric increases the garment's cost; and when we legitimately labeled our fabrics, they were too expensive for the marketplace which Harve Benard was selling to . . .

In this regard, it is undisputed that Harve Benard was paying 50% less, for the fabric it was using to make the Harve Benard garments, than Packard's customers had to pay for legitimate 10% cashmere fabric. Thus, as Packard's sales agent put it:

"[i]t's a labeling and price issue. We are competing with a legitimate 10 percent [cashmere] fabric against fabric that does not have any cashmere in it . . ."

Based on its sales and revenue figures, Harve Benard was a major participant in the low cashmere blend garment market during the relevant time period, dealing in hundreds of thousands of the Harve Benard garments every year. In the year that it first began marketing the Harve Benard garments, Harve Benard's revenue from the sale of purported "10% Cashmere" garments increased by more than two hundred fifty percent (250%) over what it had been the previous year. Thereafter, during the 1994-1998 period, its revenues from sale of the Harve Benard garments continued at this higher level.

Packard, correspondingly, was the major U.S. participant in the low cashmere blend fabric market during the relevant time period,[3] and in the first year that the defendants began marketing the Harve Benard garments, Packard's overall fabric sale revenues dropped by twenty-five percent (25%) from the previous year. In the years that followed, Packard's overall fabric sales revenues continued to be depressed, relative to what they had been before the introduction of the Harve Benard garments.

Other aspects of Packard's business were also negatively affected by the problem of the Harve Benard garments. Packard described some of these effects in its supplemental interrogatory answers:

> In addition to the damages calculated using the method identified in Packard's response . . . [and] the profits unjustly made by the defendants . . . , Packard was . . . damaged as follows:

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3. Mr. Warshaw testified in his deposition, which was part of the summary judgment record, that only Packard and one other United States mill made low content cashmere fabric during the relevant time period; and that the other mill made very little in comparison to Packard.

> a. the low cost of [low cashmere blend] garments due to the defendants' false labeling caused the market price of such garments to fall. Because of the defendants' unfair price advantage, *Packard lost existing customers* . . . [and]
>
> b. The loss of business due to the defendants' mislabeling . . . forced Packard to decrease its labor force by laying off 49.5 employees in calender year 1995 . . .

(Emphasis added). As Packard's President, John Glidden, explained:

> A: . . . We had the ability to produce large quantities of blazer weight [cashmere blend] fabrics . . . and *Harve Benard's cheating of* [sic on] *the labeling of their garments kept us from growing our market into that area* . . . We had finished making considerable investments in plant and equipment, completing it in 1994, 1995 . . . and *we were unable to sell the goods in the marketplace.*
>
> Q: What specific evidence do you have that Harve Benard's alleged activities caused your inability to reach full manufacturing capacity?
>
> A: . . . customers were telling us . . . that we were losing business and they were not ordering from us *because of the mislabeled Harve Benard garments.*

(Emphasis added).

During this period, at least as early as January 1995 (a year *before* the commencement of this action), Harve Benard knew that recycled material was being used to make the portion of the Harve Benard garments that it was claiming to be cashmere,

because it had received a communication in writing from its fabric supplier stating "FOR YOUR INFO PLS NOTE MILL IS USING RECICLED CHASMERE [*sic*]". *See* Petition at 54a ("It may be inferred that HB [Harve Benard] received the letter . . . and . . . was at least on inquiry notice as early as January 1995 that the [alleged] cashmere in its blazers was not virgin, but recycled").

Nevertheless, Harve Benard continued to market the Harve Benard garments without any "recycled" designation on them, and without disclosing, as required by law,[4] that the purported cashmere in them consisted of recycled material, until months after the commencement of this lawsuit in 1996, and even then only after the plaintiffs sought a temporary restraining order on the issue. When Saks, one of Harve Benard's biggest customers, learned that the purported cashmere garments it had purchased from Harve Benard might not be as labeled, and specifically might be recycled, its Merchandise Manager and in-house counsel informed Harve Benard, both orally and in writing, that if that were so, Saks would not wish to sell the garments.

Again, the evidence on this point was specific, and came from Saks' own representative:

> Q: At the January 11, 1996 meeting, . . . *Lynne Ronon, the merchandise manager at Saks, told Harve Benard that Saks did not wish to sell garments containing recycled cashmere; correct*?
>
> A: *Correct. . . .*
>
> Q: And then in your letter written ten days or eleven days later, *you confirm that to Harve*

4. The Wool Products Labeling Act, 15 U.S.C. § 68, *et seq.*, requires that recycled material, whether wool or cashmere, be labeled "recycled."

> *Benard's attorneys by reminding them that* Lynne Ronon had advised Harve Benard that, in your words, "*Saks does not wish to sell jackets containing recycled cashmere*"; correct?
>
> A: That's what the letter says.
>
> Q: And it's your letter?
>
> A: *It's my letter.*

(Emphasis added). In this regard, recycled fabric is manufactured "through the physical or chemical deconstruction", of pre-existing fabric and garments, which are chopped up, chemically stripped, dried, and then rewoven. It is qualitatively inferior to new fabric, and does not perform or hold its appearance as well. As the Institute's President explained in his affidavit:

> I have personally observed the process of used garments being recycled both in Italy and the United States. The process of recycling . . . involves the use of machinery *to tear apart existing garments*, during or after which they are subjected to a *wet processing* with the resulting wool fibers *dried out*, frequently carbonized (*subjected to heat and sulphuric acid), and then reused* in the manufacture of other fabric.
>
> In the process of tearing apart existing garments, *considerable damage is inevitably done* to the fibers in those garments, and *additional damage is also done by the acid and other chemical treatments* applied to them during the recycling process. The result is that *recycled fibers* frequently have *substantial damage to their scale structure which effects their ability to felt, or bind together*, thereby

> effecting the ability of a recycled fiber fabric to hold together as well or as long as the fibers that are being used in the fabric for the first time. . . .

Petition at 112a-113a (emphasis added).

Thus, at the summary judgment stage, there was evidence in the record that the defendants had intentionally and materially mislabeled inferior garments (i) by failing to disclose that they were "recycled" (the "recycled cashmere claim"), thereby giving the impression they were new; and (ii) by labeling them "cashmere" when in fact they were not (the "cashmere content claim"), thereby lying about what the garments actually were. *See* Petition at 4a. As the Court of Appeals pointed out, there was also evidence that this false advertising had caused harm to the plaintiffs:

> a rational factfinder could reasonably infer that the substantial cost savings Harve Benard enjoyed from using non-cashmere or recycled cashmere fabric allowed Harve Benard to lower the price of its blazers, thereby preventing Packard's customers from competing in the market. Indeed, using inexpensive materials that are represented as something more valuable would create a substantial competitive advantage by undercutting competitors who correctly represent their products. . . . This reasonable inference, to which plaintiffs are entitled at summary judgment, enables plaintiffs to demonstrate the causal link between the harm they suffered and defendants' misrepresentations.

Id. at 32a-33a. The Petition fails to confront this evidence, and simply pretends that it does not exist. In the process, it misstates the record, and the holdings of a number of prior appellate decisions in the false advertising area.

C. THE MISSTATEMENTS IN THE PETITION FOR CERTIORARI

The misstatements in the Petition for Certiorari fall into several different categories.

First, the Petition repeatedly claims that there was "no proof of materiality, no proof of consumer deception, and no proof of causation, each of which is an essential element of a Lanham Act damages claim." *See* Petition at 1, 8-15. In fact, there was ample evidence that the two types of false advertising in issue in this case — labeling the garments as cashmere when in fact they were not, and failing to label them recycled when in fact they were, *see* Petition at 4a — were material, inherently deceptive, and had caused harm to the plaintiffs. *See* Petition at 15a-20a (describing the evidence as to materiality); at 20a-30a (describing the evidence as to literal falsity and deceptiveness of the labels); at 30a-35a (describing evidence of causation and damages). The Petition simply ignores this evidence, preferring, as the Court of Appeals pointed out (in the case of one piece of evidence), to "misunderstand or underestimate" the import of it.

Second, the Petition claims that the Court of Appeals decision permitted plaintiffs to "rely upon a series of unrecognized presumptions and inferences." *See* Petition at 2, 3-4, 5-7. 9-10. In fact, the presumptions that Court of Appeals relied upon were basic and well-established ones dealing with the discrete issue of whether evidence of "consumer reaction" is required to show "deceptiveness" in a situation where the challenged advertisements are literally false. *See* Petition at 13a ("[w]here the advertisement is literally false, a violation may be established without evidence of consumer deception"); at 23a ("we can presume . . . that consumers have been deceived when a defendant has explicitly misrepresented a fact that relates

to an inherent quality of characteristic of the article sold"); at 26a ("[i]t is well-established that if there is proof that a defendant intentionally set out to deceive or mislead consumers, a presumption arises that customers in fact have been deceived").

In mistakenly arguing that these presumptions are "previously unrecognized," the Petition repeatedly, and badly, miscites prior decisions of the Court of Appeals and other Circuits — typically by confusing distinguishable legal concepts such as "materiality," "deceptiveness," and "harm." The Petition argues, for example, that "[b]efore the Court of Appeals opinion, only plaintiffs seeking injunctive relief (not damages) were entitled to a presumption of consumer deception when the alleged false advertisement was literally false." Petition at 5. This is incorrect, because as the Court of Appeals pointed out, "it has become the practice of most circuits to apply the presumption to all literal falsity claims," *see* Petition at 21a (citing cases), and the Court of Appeals itself had already done so in an earlier damages case, *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.2d 24, 30 (1st Cir. 2000). *See* Petition at 22a ("defendants' argument contradicts this Court's explicit pronouncements on the issue").

Third, the Petition argues that "no court of appeals, including the First Circuit, had ever applied such a presumption to a plaintiff seeking damages without the additional showing of intentional mislabeling not present here." Petition at 7. This is simply untrue, as the Court of Appeals specifically pointed out in its opinion. *Id.* at 23a ("None of the five circuit cases cited *supra*, however, speaks of intent to deceive as a prerequisite to applying a presumption of consumer deception on a literal falsity claim . . . [rather] the intent to deceive is an independent basis for triggering a presumption of consumer deception"). Moreover, there *is* evidence of intentional mislabeling here, as the Court of Appeals (again) pointed out.

Id. at 26a-30a ("Harve Benard's unwillingness to comply with the law, despite being on notice of its violation, can be seen as an attempt deliberately to deceive the consuming public"). The Petition simply ignores it.

On the issue of the "materiality," the Petition makes the same mistake in claiming, repeatedly, that there was no evidence that the defendants' alleged false advertising was material, and that "[t]he Court of Appeals ruled . . . that Packard could simply rely upon 'presumptions' of . . . materiality." *See* Petition at 8. *See also* Petition at 10 ("A Lanham Act plaintiff . . . can now rely upon . . . a presumption of the element of materiality."); *id.* at 14 ("the Court of Appeals simply presumed that the actual percentage of cashmere in a garment . . . would be likely to influence the purchasing decision.").

In fact, there was ample evidence of materiality, and as the Court of Appeals explained, "[o]ne method of establishing materiality involves showing that the false or misleading statement relates to 'an inherent quality or characteristic' of the product." *See* Petition at 15a. In this regard, the Court correctly observed, as to the plaintiffs' "cashmere content claim," that "cashmere is a basic ingredient of a cashmere-blend garment; without it, the product could not be deemed a cashmere-blend garment or compete in the cashmere-blend garment." *Id.* at 16a. As to the "recycled cashmere claim," the Court noted that there *was* actual evidence of materiality in the record:

> Saks initial refusal to sell the recycled cashmere garments; Saks' belief that the matter could lead to a negotiation; and the actual negotiations that took place before Saks agreed to continue selling the garments are competent evidence from which a reasonable juror could conclude that the issue related to an inherent quality or characteristic of the garment,

id. at 19a, and that even apart from that evidence,

> a rational factfinder could conclude that consumers, especially experienced ones like retail stores, would likely be influenced in their purchasing decisions by labeling that gave the false impression that the garments contained virgin cashmere.

Id. at 18a.

Again, the Petition simply ignores this evidence, preferring to advance the discredited argument (rejected by the Court of Appeals) that out-of-context quotations from the defendants' early Rule 30(b)(6) deposition of Packard dealing with individual consumers, instead of the retail store consumers primarily in issue, *see* Petition at 18a ("[i]n this case, the relevant consumers include . . . the retail stores that purchased Harve Benard garments instead of buying from Packard's garment manufacturer customers"), somehow shows a lack of evidence on the "materiality" and "consumer deception" issues. *See* Petition at 12-13. In fact, this argument is nothing more than a sleight of hand, because testimony from that deposition made it clear that the statements were limited to individual consumers, and that as to the far more important (to this case) retail consumers, there was ample evidence on both issues — as the Court of Appeals recognized. *See* Petition at 15a-30a.

The Petition goes even further than misstatement, though, in asserting that the Court of Appeals decision "ignores the undisputed fact that Harve Benard's fabric . . . contained less expensive recycled cashmere." Petition at 15. That alleged "fact" was not at all "undisputed" — to the contrary, the plaintiffs' evidence was that the garments contained virtually no cashmere, recycled or otherwise. *Id.* at 3a ("the [plaintiffs'] experts independently concluded that, despite Harve Benard's labels to the contrary, the garments contained no cashmere.")

This problem of ignoring, misstating, and confusing the record permeates other portions of the Petition as well. On the one hand, the Petition argues that "Harve Benard's use of less expensive fabrics" was the only evidence that its widespread mislabeling had caused the plaintiffs any harm. *See* Petition at 14. On the other hand, it claims that there was no evidence "that Harve Benard's garments were cheaper *because* they were mislabeled" (emphasis in original). *Id.* at 15. In fact, as the Court of Appeals recognized, there *was* such evidence, and it included the fact that "[b]ecause Harve Benard was not putting the cashmere in the fabric, they had a tremendously reduced cost." *Id.* at 34a. *See also* Petition at 32a ("Harve Benard was paying $5 per yard less for the fabric it was using to make its garments than Packard's customers, who were paying for legitimate 10% cashmere fabric"). There was also evidence that "Packard's customers actually reduced their purchases of Packard's cashmere-blend fabric because they could not compete with Harve Benard's lower priced garments." *Id.*

The defendants argued to the Court of Appeals, and continue to argue in the Petition, that this evidence was insufficient to suggest that their mislabeling gave them an unfair competitive advantage. The Court of Appeals recognized, though, that "using inexpensive materials that are represented as something more valuable would generally create a substantial competitive advantage by undercutting competitors who correctly represent their products," *see* Petition at 32a, and that "[i]n the end, the parties present witnesses who hold inconsistent positions on a crucial issue of fact . . . this dispute is one which a jury is best suited to resolve." *Id.* at 35a.

The Petition characterizes this result as "plac[ing] advertisers and merchants (both wholesalers and retailers) at the mercy of overzealous plaintiffs," implying that the petitioners are beleaguered innocents being unfairly accosted by zealots.

See Petition at 16. Unfortunately, the evidence suggests the reverse — that it is the Petitioners who are zealously prepared to go to any lengths, and make any argument necessary, to avoid being held accountable for nearly a decade of materially false advertising. In either event, there is no justification for an interlocutory review of the case by this Court, particularly before trial.

REASONS FOR DENYING THE PETITION

The Petition should be denied because (1) the Court of Appeals decision involved nothing more than the application of well-settled principles of law to a set of disputed facts; (2) there is no conflict between the Court of Appeals decision and those of other Circuits dealing with these issues, (3) there are no exigent circumstances warranting interlocutory review of the Court of Appeals' decision, and in any event, the decision was correct.

I. THE COURT OF APPEALS DECISION INVOLVED THE APPLICATION OF WELL-SETTLED RULES OF LAW TO DISPUTED FACTS

The Petition's claim that the Court of Appeals decision announced a "new rule" of law is simply mistaken. *See* Petition at 23a ("noting that its decision on the "deceptiveness" issue "require[d] neither a leap of faith nor the creation of any new legal principle"). In fact, the decision applied existing rules to evaluate the propriety of summary judgment in a situation where the defendants, while conceding that there was legally sufficient evidence of their mislabeling, argued that they should escape liability anyway — based on their claim that there was insufficient evidence to satisfy the other elements of a false advertising claim.

The application of well-settled rules to disputed facts is not the type of situation in which this Court customarily intervenes, nor should it. *See* U.S. Supreme Ct. Rule 10. This is particularly true in this case, where the Court of Appeals, exercising *de novo* review of a summary judgment order in a private civil action brought under both state and federal law, based its determination on the fact that "the district court relied on impermissible inferences in favor of the moving party in reaching its conclusions" — in violation of Fed. R. Civ. P. 56 and this Court's holding in *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

II. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND THOSE OF OTHER CIRCUITS DEALING WITH THESE ISSUES

The Petition's claim that the Court of Appeals decision is somehow in conflict with those of other Circuits on these issues is insupportable, as a simple review of those decisions makes clear. *See Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993) ("a [false advertising] plaintiff must prove *either* literal falsity or consumer confusion, but not both"); *Johnson & Johnson v. GAC Int'l, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988) ("When a . . . representation is literally . . . false, the court may grant relief without reference to the advertisement's impact on the buying public"); *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000) (holding, on a claim for both damages and injunctive relief, that "when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact the statements had on consumers"); *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 740 (8th Cir. 2000) (ruling, on a claim for damages, that "when an advertisement is literally false . . . the plaintiff need not prove that any of its customers were actually persuaded by

the advertising"); *Balance Dynamics Corp. v. Schmidt Industries*, 204 F.3d 683, 693 (6th Cir. 2000) ("noting that when an advertisement is literally false, 'a plaintiff need not demonstrate actual consumer deception to obtain relief' "); *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971 (7th Cir. 1999) (ruling, on a damages claim, that "(w)here the statement in question is actually false, then the plaintiff need not show that the statement either actually deceived customers or was likely to do so"); *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1333 (8th Cir. 1997) (consumer deception presumed where there is evidence that the defendants acted deliberately to deceive); *U-Haul Int'l Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) (same).

Thus, there is no conflict between the Circuits that this Court needs to resolve, and nothing extraordinary about the Court of Appeals' application of existing law in this area.

III. THERE ARE NO EXIGENT CIRCUMSTANCES WARRANTING INTERLOCUTORY REVIEW OF THE COURT OF APPEALS' DECISION, AND IN ANY EVENT THE DECISION WAS CORRECT

The Petition claims that the Court of Appeals decision is not only wrong, but is so badly wrong that it must be reviewed by this Court before the upcoming trial on the merits. *See* Petition at 15-16. The petitioners' rationale for this argument is that the decision represents an "unprecedented contraction of the availability of summary judgment" in false advertising cases, and that as a result, "so long as a Lanham Act plaintiff seeking damages complies with the notice pleading standard in its complaint, its claims will remain untested until a defendant presents evidence at trial." *Id.* at 16.

These dramatic assertions are not supported by the record, and in fact are premised entirely on the Petition's incomplete

and inaccurate description of the record. *See* Statement of the Case, *supra*. The key evidence at the summary judgment stage of any false advertising case is whether the relevant products were falsely labeled or not — and that is not even in question here, because as the Court of Appeals pointed out, "defendants conceded that the issue of whether the[ir] garments were mislabeled is both material and genuinely in dispute," Petition at 6a, and "[f]or purposes of this appeal, defendants concede that they have made a false or misleading statement of fact in describing their blazers"). *Id.* at 15a. Thus, evidence beyond the pleadings was obviously required here, and submitted.

It is also beyond purview that the additional evidence described in the Statement of the Case, *supra*, was part of the summary judgment record that the Court of Appeals reviewed when it made its decision. As stated, this included evidence of materiality, intent, and causation of harm. Thus, the Court of Appeals decision was not predicated on pleadings, nor can it be construed as sanctioning such an approach. It was based on actual evidence in the record — evidence which there is no good reason for this Court to review again, particularly where no unsettled or controversial issues of law are involved.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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